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Issue Date: 20 February 2003

**CASE NOS.: 2002-LHC-1284
2002-LHC-1285**

**OWCP NOS.: 01-154413
01-154414**

IN THE MATTER OF:

MICHAEL SWAN

v.

**GENERAL DYNAMICS/
ELECTRIC BOAT CORP.**

Employer

APPEARANCES:

SCOTT N. ROBERTS, ESQ.

For The Claimant

CONRAD M. CUTCLIFFE, ESQ.

For The Employer/Carrier

**Before: LEE J. ROMERO, JR.
Administrative Law Judge**

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Michael Swan (Claimant) against General Dynamics/Electric Boat Corporation (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on August 1, 2002, in New London, Connecticut. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 7 exhibits,

Employer/Carrier proffered 6 exhibits¹ which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.²

The record was left open for additional development. Claimant submitted depositions of himself and Dr. Philo Willetts as CX-8 and CX-9, respectively. The medical records of Employer's hospital were received into evidence as CX-10. The record was closed on October 2, 2002, but reopened on October 25, 2002 for the limited purpose of receiving two of Employer's hospital incident reports as CX-11. The record was closed on October 25, 2002. Post-hearing briefs were filed on behalf of Claimant and Employer/Carrier on November 1, 2002. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That there existed an employee-employer relationship at the time of the accident/injury.
2. That the Employer was notified of the accident/injury on November 20, 2001.
3. That Employer/Carrier filed a Notice of Controversion on November 30, 2001.
4. That an informal conference before the District Director was held on February 13, 2002.
5. That Claimant's average weekly wage at the time of injury was \$1,063.81 for a compensation rate of \$709.21.

¹ Employer's exhibits 1 through 4 were received, but 5 and 6 were reserved pending post-hearing development. (Tr. 9, 45). Claimant's counsel offered no objections to the reserved exhibits after post-hearing development. Consequently, the exhibits were received into evidence.

² References to the transcript and exhibits are as follows:
 Transcript: Tr.__; Claimant's Exhibits: CX-__;
 Employer/Carrier Exhibits: EX-__; and Joint Exhibit: JX-__.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was born on November 11, 1952, and was 49 years old at the time of the formal hearing. He graduated from high school in 1971, unsuccessfully tried working in the automotive industry, but eventually found employment in March 1973 as a shipfitter with Employer. He has worked for Employer ever since, and is currently working as a first-class structural inspector. (Tr. 18-19).

Claimant sustained an injury in a one-car motor vehicle accident in December 1973. While he cannot recall much of the details, he recalls speeding and losing control of the car, which flipped. He received medical treatment from Lawrence and Memorial Hospital and from Dr. Derby, an orthopedist, for his ankle, which was crushed in the accident. (Tr. 19-20)

Although there are no medical records regarding Dr. Derby's treatment, Claimant recalled that pins and screws were inserted into his ankle, which began to heal. They were removed over the following six or seven months as the ankle improved. When the last screw was removed, Claimant's cast was removed. Three weeks later, he tried to return to work. (Tr. 20-22).

Upon his return to work, Claimant found that he could not perform his job, which demanded "constant walking ..., up and down ladders all day, in and out of the boat all day ... you are on your feet eight hours a day ... a lot of propping yourself up with your feet in a position to work." He was told to "either go back on the boats or look for a new job." When he found that he could not continue performing his job, a foreman recommended seeking a clearance for a "straight floor job." (Tr. 21-22).

Claimant returned to see Dr. Derby episodically, with whom he continued to treat for five or six years. Dr. Derby provided conservative treatment for pain and constant headaches. His pain would vary with the work he performed. If there was not much climbing involved, he felt less pain. (Tr. 22-23).

As a shipfitter, Claimant worked on submarines, and would enter and exit the vessels via ladders running through holes cut in the bottoms of the hulls. After 14 years of shipfitting, Claimant became a structural inspector for Employer. He continued to work on submarines, inspecting everything from the boats' bows to sterns, except for the reactor rooms, which were inspected by nuclear inspectors. (Tr. 23-26).

Claimant is capable of doing the work as an inspector. On the day before the hearing, he worked "all day long," inspecting steel and foundations on a boat. He inspected ballast tanks at the boat's foreward and aft ends. This process involves "a lot of climbing through tight and narrow areas." He also inspected welds to insure they were not cracked. This procedure involves carrying a "yoke," which is a magnetic device weighing about 7 pounds. He had to climb ladders to enter and exit the boat. (Tr. 26-28).

His job also involves using his knees to crawl in tight areas. Much of his job is performed on his knees, although he began wearing Employer-provided kneepads for "the past couple of years." He believes his knee condition is related to his job because he "constantly bangs" them against the rungs of ladders, which he frequently climbs. Likewise, he bangs his knees when he climbs into tight areas.³ He believes he reported his knee injuries "once or twice." (Tr. 35-36).

Claimant stated he was led to pursue his claim for benefits because "I am going on 50 years old, and I'm not sure how much longer I can physically do this work with the demand that's on me." His current ankle malady does not feel the way it did almost 30 years ago. He believes his injury is related to his work because "I beat it up constantly. I am tripping over train tracks and cables. It's not the safest place in the world to work." He reported injuries to the yard hospital, and was periodically sent home for a sprained ankle. He was once diagnosed by Dr. Derby with a severe strain, for which he was out

³ Claimant described his injuries to his knees and ankle in his deposition as "Normal strains, twist the [ankle]. You know, twist the knees and bang them a lot going up and down the ladders. (CX-8, p. 8).

of work "for a couple of weeks" and paid compensation benefits by an insurer. (Tr. 28-30).

Claimant was evaluated by Dr. Browning, who physically examined Claimant's ankle and knees. The examination involved taking X-rays, flexion and mobility testing, and lasted about two and a half hours.⁴ He was also evaluated by Dr. Santoro, who examined him for about 15 minutes. (Tr. 30-32). Dr. Santoro was provided X-rays, but never actually put them on a viewing screen. Dr. Santoro also failed to take any measurements on the X-rays. Rather, "he was just all eyeball." Dr. Santoro did not discuss Claimant's work in the shipyard in much detail when he evaluated Claimant. Claimant was never examined by Dr. Philo Willets. (Tr. 34-45). Other than a "Dr. Riley," who is deceased, no physician treated Claimant for his ankle after Dr. Derby. (Tr. 39).

Claimant denied telling Dr. Santoro he never missed work as a result of his injuries sustained from tripping on the job. (Tr. 32-33). Claimant denied that he can walk without a limp. He limps daily, and limps worse according to the amount of "climbing and everything else." He has limped ever since his car accident, but the condition has become worse. Likewise, it is worse at the end of the week than it is at the beginning of the week. He also limps more at the end of the day than at the beginning of the day. Claimant further denied telling Dr. Santoro his job is not any more stressful than any other type construction job. (Tr. 33-34).

Other than Tylenol or aspirin, Claimant has not taken any medication for his ankle or knees. He continues to take Tylenol and aspirin "when the need arises." He experiences pain in his ankle "when I put a lot of pressure on it, and I have no movement ... like if you're reaching up or in a bad position using your feet to hold yourself in that position, and then the ankle bothers and hurts." He has lost mobility in his left ankle as compared to his right ankle. The mobility has decreased "decidedly so" over the years. (Tr. 36-37).

Likewise, Claimant's knees cause a constant ache. On some mornings, he can barely walk. When he exits the tanks, which he enters by climbing through manholes, he "hobbles." (Tr. 37-39).

⁴ In his deposition, Claimant estimated Dr. Browning's evaluation lasted an hour and a half. (CX-8, p. 26).

On cross-examination, Claimant stated Dr. Riley has been deceased for "at least a good eight or nine years."⁵ Since then, he has consulted nobody for his knees or ankle. He went to see Dr. Browning "basically to get the evaluation we are talking about today." He has no plans to return to Dr. Browning, because the doctor "doesn't take patients." He was referred to Dr. Browning by his attorney. Claimant agreed he returned to full duty as a shipfitter "within a short time" after his 1973 accident. He has performed his "full job" as an inspector and lost no time in the "past four or five years" due to injuries. (Tr. 39-42).

Claimant admitted Dr. Derby told him that he could expect his ankle to get worse over time and that he would eventually get arthritis in his ankle. He acknowledged there was no specific knee injury for which he sought evaluation by Dr. Browning. (Tr. 42-43).

The Medical Evidence

Dr. Vincent M. Santoro, M.D.

On May 14, 2002, Dr. Santoro, who is a Board-certified specialist in orthopedic surgery, was deposed by the parties. (EX-4). He specializes in "shoulder, knee, and complex foot and ankle problems." He currently performs surgery, estimating he performed 30 to 35 surgeries within the month before his deposition. He also serves as a University of Connecticut School of Medicine clinical associate professor which involves teaching residents. (EX-4, pp. 4-5; EX-4, exhibit 1).

Dr. Santoro discussed his January 29, 2002 examination of Claimant, who did not know why he was being examined by Dr. Santoro. He took Claimant's history, including his work with Employer and his injury in 1973, when "he had operative treatment for the left ankle and had gone on to develop degenerative arthritis. (EX-4, p. 6). Claimant worked as a shipfitter, which involved heavy lifting of 70 to 80 pounds, climbing ladders, and walking on hard surfaces. Claimant also worked mostly as a structural inspector, which involved climbing ladders and entering and exiting tanks and bilges. (EX-4, p. 7).

⁵ Claimant added that Dr. Riley told him that his arthritis was a natural progression "due to the nature of my work ... with all the banging and working on the steel and everything else, you know, it plays a factor." (CX-8, p. 16).

Claimant had a normal gait, despite an "arthritic left ankle which was essentially fixed in a stiffened position with fairly normal alignment with healed incision." There was "no inflammation and really not much ... pain regarding the left ankle." (EX-4, p. 8).

Claimant's knees were not painful, but were reported normal with full range of motion. There was no inflammation, and ligaments were "all stable." "Patella crepitus," or a "crunching sound" that implies "some softening of the cartilage," or "a standard wearing out" was observed. X-rays indicated evidence of "some early spurring," but were otherwise normal. (EX-4, pp. 8-9).

Dr. Santoro diagnosed "early degenerative arthritis in the knees mostly ..., but also had longstanding left ankle arthritis from the original [1973] injury." He concluded, to a reasonable degree of medical certainty, that Claimant's conditions regarding his knees and left ankle were not work-related. Rather, Claimant exhibited a "natural history" of degenerative change from the 1973 injury and a "normal amount of wear that one would find with a 49-year old." Thus, Claimant's conditions "did not appear to be consistent with ... work. It was just consistent with his person." Likewise, Dr. Santoro concluded to a reasonable degree of medical certainty that Claimant's work as a shipfitter and inspector for Employer did not aggravate, accelerate, or exacerbate his ongoing degenerative arthritis. (EX-4, pp. 9-12).

Dr. Santoro opined there were no present impairments or disabilities to the knees or left ankle which would be causally related to Claimant's work for Employer. He did not agree with Dr. Browning's conclusions that implied Claimant's degenerative changes were due to work-related conditions. Dr. Santoro compiled his opinions in a January 29, 2002 medical report. (EX-4, pp. 12-14; EX-4, exhibit 2).

On cross-examination, Dr. Santoro agreed Claimant "absolutely" has an ankle impairment, and also has mild degenerative arthritis in his knees. He affirmed his opinion that Claimant's condition is not work-related. According to Dr. Santoro, an impairment rating for Claimant's knee condition based on the AMA guides would be "very difficult," because there is "no identifiable criteria on an X-ray for the kneecap to really give you that unless it's absolute bone on bone." (EX-4, pp. 14-17).

Dr. Santoro explained that Claimant has no impairment for his knees. "Arthritis" is often used to "imply something awful," like "a little old lady who's walking around who needs a knee

replaced." He added, "My knees crunch more than his and I don't think I have, quote, arthritis." Thus, Claimant experiences "an incredibly mild form" of arthritis that is consistent with a man his age. Dr. Santoro did not think Claimant's knee condition "even falls into Table 17-31 [of the AMA Guides To Permanent Impairment] as something we'd even look at." He noted, Claimant "misses no time [from work], ... takes no medication, ... uses no assistive devices, ... and stays in 'the same capacity.' To me he's not impaired." (EX-4, pp. 16-17).

Dr. Santoro noted that Claimant's ankle impairment is "pretty clear cut that it's an arthritic condition," based on Claimant's history, medical experience, and available literature from the last 20 or 30 years. "[I]f [Dr.] Browning's rating turns out that that's what the tables apply, that's perfectly fine. But that's not work-related. That's his own person carried forth in time." Thus, Claimant's ankle injury is the natural progression of the 1973 injury. As such, Claimant's ankle "does not get an impairment rating based on work." (EX-4, pp. 17-18).

Dr. Santoro admitted he had no X-rays from Claimant's 1973 injury, nor did he have any records from Dr. Derby, the treating physician at the time; however, if Dr. Derby assigned restrictions at the time, it would be consistent with Claimant's injury. Likewise, he would expect Claimant would "continue to hurt an ankle that's chronically stiffened from a previous injury. He could do that just walking down stairs." (EX-4, pp. 18-20).

According to Dr. Santoro, "Unless [Claimant] had an absolutely serious injury which required medical attention by Dr. Derby over the first several years or even after that, this is a natural progression of the original injury." He added, "If you have a stiff ankle, you're going to trip. I'm talking about a true injury ..., not an ability to negotiate." Dr. Santoro opined Claimant's condition would be the same regardless of whether he worked a demanding job or a sedentary job after his 1973 injury. He explained, "I think the natural progression would occur independent of what you were doing if you have an ankle that's not fixed right." (EX-4, pp. 20-22).

Dr. S. Pearce Browning, M.D.

On May 23, 2002, Dr. Browning was deposed by the parties. (CX-7). He is board-certified in the area of orthopedics. He obtained his M.D. in 1954 from Columbia University College of Physicians and Surgeons. He was a resident with the Roosevelt

Hospital in New York City, where he obtained one year of surgical internship. He was in the Navy for 18 months, and had six months of general surgical residency at Stamford Hospital. He had three years of orthopedic surgery residency at the Barnes Hospital in St. Louis, and concluded with six months of "hand fellowship" at the University of Iowa. (CX-7, pp. 5-6).

Dr. Browning evaluated Claimant for his left ankle and bilateral knee complaints upon a referral by Claimant's counsel. He was given Claimant's history. He found no specific injury date for Claimant's knees, but noted Claimant's knees "progressively bothered him" while crawling around various parts of vessels. (CX-7, p. 7).

He also noted Claimant's 1973 ankle injury involved an "open reduction" by Dr. Derby. Claimant was in a cast for about six months as he recovered from his surgery. He had "significant atrophy of the muscles below the knee, which you would expect due to such an injury, and he was on light duty for a period of time until he had some improvement in his muscle function." (CX-7, pp. 7-8).

X-rays revealed "narrowing of the medial and lateral compartments and exostosis⁶ of the shaft of the left tibia and narrowing to the patellofemoral joint." Claimant's exostosis was first noted when he was eight years old, according to his recollection. (CX-7, pp. 9-10).

Dr. Browning disputed Dr. Santoro's conclusion that Claimant's knees were basically normal except for minor arthritic changes. Specifically, he stated, "I don't think a 49-year old man should have a narrowed joint unless there has been some type of injury or other process occurring." According to Dr. Browning, narrowing is an objective finding describing an appearance on an X-ray. Arthritis is the "usual reason" there is narrowing in the joint, "but joints can be narrow because of an injury or other conditions which are not present here." Nevertheless, "the statement that a joint is narrowed is really an observation of the appearance on an X-ray. (CX-7, pp. 10-11).

Although the AMA guides automatically assign an impairment rating of 7 percent to the leg for the loss of 1 millimeter of joint space in the human knee, Dr. Browning assigned a 7.5

⁶ An exostosis is a "projection of bone," where the growth cartilage grows until the patient reaches maturity. (EX-7, p. 10).

percent impairment rating to each of Claimant's legs "based on the history, the physical examination, the amount of crepitus under the kneecap, and in the medial and lateral compartments and the appearance on X-ray." He did not actually measure the joint space on Claimant's X-rays. (CX-7, p. 12).

Dr. Browning opined the mild degenerative changes that Dr. Santoro discussed on Claimant's X-rays were a permanent condition. Likewise, the narrowing of Claimant's joints were a permanent condition. (CX-7, p. 13).

Regarding Claimant's left ankle, Dr. Browning affirmed his impairment rating of 24 percent. His conclusion was based on an examination which included X-rays of Claimant's ankle to establish ankylosis, or a joint which "does not move." Simply put, Claimant's foot had the appearance of motion, but the joints within his ankle were ankylosed. Dr. Browning relied on the AMA guides to establish appropriate impairment ratings for the condition. (CX-7, pp. 13-15).

Dr. Browning formed his opinion that Claimant's ankle condition was related to his work based on an X-ray; however, he stated repetitive trauma cannot be distinguished from the natural and unavoidable progression of the original injury. He stated, "[Claimant's] problem starts with a fracture of the ankle, and this is a severe fracture and there will be some progressive degeneration ...;" however, based on his experience, Dr. Browning opined that "those 26 years of constant walking, standing, and heavy use did contribute to the final picture that I see on the X-ray." He added that he followed several conditions like Claimant's over a period of time. Dr. Browning concluded Claimant's type of work performed for Employer would "lend itself to some degeneration in the condition" (CX-7, pp. 16-17).

Dr. Browning's experience with construction workers has not been that they develop Claimant's type of knee problem, "with the exception of people who lay tile floor." People with a history of "many years crawling around on steel decks and other places and they are showing more arthritis in the knees than I would expect in an individual of that age." Dr. Browning may have agreed with Dr. Santoro ten years ago, but his experience compels his conclusion that "there is a repetitive injury to knees from this type of work." Dr. Browning agrees with Dr. Santoro that Claimant is not a candidate for knee replacement at this time, although he may become a candidate after 20 years. (CX-7, pp. 18-19).

On cross-examination, Dr. Browning admitted he evaluated Claimant for a hand/arm problem upon the referral of another individual, "Mr. Spain." He took Claimant's history at that time and prepared a June 22, 2001 report with respect to that evaluation. He acknowledged a statement that Claimant sustained a fracture of his right ankle and has post-traumatic arthritis in the ankle. He also did not indicate any knee injuries in that report. (CX-7, pp. 20-22).

Dr. Browning conceded that his primary interest is in hands, and he specializes in the area of hands and arms. Of 1234 past examinations, approximately 1000 were "hand, arm" evaluations. Dr. Browning is in "half-time practice." The last surgery he performed was in 1986. The last knee surgery he performed was in "the Eighties." (CX-7, pp. 22-24).

He admitted that the sub-specialties involving sports medicine and treatment for hands, backs, knees, and shoulders have become "progressively more differentiated." If patients require knee surgery, Dr. Browning offers them a choice of individuals who do a "substantial amount of work in that area and in whom I imposed considerable confidence." For instance, he referred a patient with knee problems to "Dr. Joyce," who is "heavily involved in sports medicine, including knees, shoulders, and so on." Dr. Browning scheduled no appointments to see Claimant again. (CX-7, pp. 24-25).

When Dr. Browning evaluated Claimant's knees, Claimant was working full-time and had lost no specific time from work because of his knees. There was no evidence of any trauma, redness, or swelling. No specific points of tenderness in his knees were found. Claimant was not limping. His ligaments were stable, with no meniscal snap. (CX-7, pp. 25-27).

Regarding Claimant's ankle, Dr. Browning testified there are different causes for arthritis, including an individual's activity, whether a person suffers a sports injury with a known torn cartilage with or without arthroscopic removal, and age. He added that, "to some degree, there is some wear in everybody's joints." (CX-7, pp. 27-30).

Dr. Browning agreed there was a severe past fracture and a fixation unrelated to Claimant's work. Without Dr. Derby's records, Dr. Browning was unable to say what percentage of impairment resulted a year or two years after Claimant's treatment for his 1973 injury. He "would certainly not be surprised if, over the period of time ... from 1975 on there was some progression [of arthritis] from whatever state it was in in

1975, and I don't know what state it was in 1975." (CX-7, pp. 30-32).

Dr. Philo F. Willetts, Jr., M.D.

On July 6, 2002, Dr. Willetts, an orthopedic surgeon, provided a report in which he offered his opinion of Claimant's condition, based on the medical reports of Drs. Browning and Santoro. (EX-6). He summarized the history given to Drs. Browning and Santoro and the opinions they reached. (EX-5, pp. 1-3).

Dr. Willetts diagnosed "severe left ankle fracture, status post injury, with post-traumatic arthritis and essential fusion left ankle" and "[m]ild retropellar arthritis both knees." (EX-5, p. 3)

On "causality," Dr. Willetts opined Claimant's bilateral knee condition was the result of normal aging and was not accelerated, hastened, or changed by his employment activities. From a medical standpoint, Claimant's work might be related "if there is evidence of a Yard Occupational Clinic or injury report to his [knees] or specific medical documentation of any forceful or traumatic banging of the [knees]" Claimant's left ankle was likewise reported unrelated to his work. Rather, Claimant's arthritis was the result of his 1973 accident and the "expected sequela of that injury. To purport that work activities are responsible in any way for the result of this post fractured ankle traumatic arthritis, strains medical credulity." (EX-5, pp. 3-4).

On "impairment," Dr. Willetts reported no measurements were provided regarding the X-rays of Claimant's knees, precluding his assignment of a permanent impairment. He reported, "mild narrowing of the knee joint spaces does not qualify for impairment, however." While Dr. Browning observed "some early narrowing" of Claimant's knee joints, Dr. Santoro observed "mild degenerative changes of the knees." Without a review of the X-rays, Dr. Willetts found "no basis, in the medical records reviewed, to rate impairment with respect to the X-ray descriptions provided. He reported there could be as much as a 5% lower extremity impairment rating, according to the AMA Guides "if there had been a medically documented history of direct trauma ... combined with crepitation on physical examination." He concluded, "there is no documentation of a basis for impairment to the [knees], and certainly no basis for any work-related impairment." (EX-5, p. 4).

Dr. Willetts reported Claimant sustained a 24 percent permanent partial physical impairment of the left foot based on the AMA Guides without any further explanation. He could not apportion any amount of that impairment to Claimant's employment. Rather, he noted Claimant's 1973 injury and concluded "severe ankle fractures commonly go on to sustain significant arthritis, as ... [Claimant's] has." He added that it is not valid from a medical standpoint "to purport that work activities have contributed to his ankle arthritis, when there is a clear and unequivocal non-work-related cause of the problem." (EX-5, pp. 4-5).

On September 3, 2002, Dr. Willetts was deposed. (CX-9). Dr. Willetts concluded Claimant's degenerative arthritic condition of his right knee was not work-related. There was no evidence of direct trauma to the knee. The only abnormal finding was of crepitus "or a bit of crackling, crunching type of sensation" as the kneecap traversed the front of the thigh bone. Such crepitus is not unusual for somebody of Claimant's age. Dr. Willetts has the condition in his own knee without any injury or impairment to his condition. Further, there was no sign of meniscal tear or ligament instability or any other abnormalities. (CX-9, p. 6).

According to Dr. Willetts, crepitus is usually a permanent condition. He has treated people with the condition, but usually treated them for something else. Crepitus is caused by "any irregularity of the ball bearing surface of one or the other as it rubs together will make a little crunchy or crackly vibration" It could be traumatically induced, but may be caused by "degenerative wear and tear or an infection or another [non-traumatic] cause," including the natural aging process. Often the cause is unknown. (CX-9, pp. 6-7). Crepitus by itself does not create any impairment. (CX-9, p. 25). Dr. Willetts opined Claimant's crepitus is probably permanent. (CX-9, p. 16).

Dr. Willetts was presented with Claimant's deposition testimony, which indicated Claimant "occasionally may have banged his knees while going through submarines." The testimony did not satisfy Dr. Willett's stated criteria in his report or change his opinion that Claimant's bilateral knee condition was unrelated to his work with Employer. According to Dr. Willetts, "many people occasionally bang their knees and never be any of the worse for it." His opinion might be affected by evidence "of sufficient force of a bang to cause some visible swelling that persists and causes [Claimant] to go back a few times over the course of a couple of weeks or more. That would be sufficient ... to say that it may have damaged the cartilage behind the bone." Thus,

he would need "something reasonably credible and reasonably well documented" to conclude Claimant suffered an injury which could have contributed to a problem. (CX-9, pp. 8-14).

Dr. Willetts opined crepitus is not caused by kneeling on hard surfaces, which is an "every day act of life." It is "inappropriate to try to link that with the chance observation of some knee abnormalities later in life." (CX-9, pp. 14-15).

Dr. Willetts disagreed with Dr. Browning's opinion that Claimant's knee condition was related to the nature of his employment. He disputed Dr. Browning's opinions because Dr. Browning sees "a highly select and rather unusual population and concludes some mainstream thinking in his analyses." He agreed "[Dr. Browning] has changed over the last 10 years ... to become more inclined to opine people are injured in ways that, in my significant experience, should not be injuring people." As a result, Dr. Browning attributes injuries to activities of daily life, which is hard for Dr. Willetts to accept. Dr. Willetts did not find anything "special or unique about a job that has people kneeling on boats some of the time. And I have a hard time stating that produces knee arthritis or crepitus or any other abnormalities." (CX-9, pp. 15-16).

Dr. Willetts explained two ways of determining permanent impairments for knees under the AMA guides. One involves using measurements based on X-rays, which is inapplicable in this matter because there were no measurements taken. The other is described in "the little fine print sentence under Table 17-31 on page 544," and allows "as much as [a] 5 percent lower extremity impairment."⁷ The second approach may be used "if there were a documented significant bang to the knee, the front of the knee, that history of trauma that I would want to see medically documented, crepitus, and patellofemoral pain." (CX-9, pp. 16-18; CX-9, pp. 26-27).

⁷ The footnotes to which Dr. Willetts was referring provide:

In an individual with a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination, but without joint space narrowing on X-rays, a 2% whole person or 5% lower extremity impairment is given.

(CX-6).

Regarding Claimant's ankle, Dr. Willetts reaffirmed his opinion that Claimant's ankle injury was the result of expected sequela of the 1973 ankle fracture. Without X-rays, Dr. Willetts opined it is impossible to determine whether he treated people with the same injuries as Claimant, but he has treated a number of people with severe ankle fractures over the last 30 years. Such fractures will "very often go to permanent severe arthritis." When a joint has been traumatized and the ball bearing surface is not repaired perfectly, the fractures will progress to "very bad arthritis." Based on the nature of Claimant's injury and the less-advanced techniques used in the 1970s, Dr. Willetts did not conclude walking on Claimant's ankle or sustaining minor injuries to it were contributing factors of his present condition. (CX-9, pp. 18-19).

Dr. Willetts was provided medical records from the yard hospital after January 1988 indicating Claimant returned to the hospital on two occasions complaining of left ankle problems in 1990 and 1991. Claimant's ankle was stepped on by a co-worker in one instance, while it was twisted on a railroad track in the other.⁸ (CX-9, pp. 20-21; CX-11). Upon consideration of the additional medical history, Dr. Willetts did not change his opinion regarding the work-relatedness of Claimant's ankle condition. He noted, "A single incident would not necessarily change anything. Especially given a significant fracture with the inevitable progression." Moreover, he did not see "any records that showed a follow-up, ongoing aggravation or worsening of this condition, or something where he came back to the yard hospital, or any evidence that he had treated on the outside, or lost any more time than that." A 1990 X-ray revealed no change from a 1984 X-ray, and there was "just no evidence of the kind that one would expect [to] cause an acceleration or some new change in the way things are going." In 1991, Claimant reported a 20 or 30 percent remaining range of motion in his ankle, implying his ankle "was already significantly compromised and would be expected to continue to go downhill regardless of any twist on a track or being stepped on." (CX-9, pp. 21-22).

⁸ According to Dr. Willetts, any yard reports which were missing from 1981 to 1988 might possibly be of significance if they showed "a credible significant injury to one of these joints ... and ongoing credible objective findings ... that [Claimant] returned a number of times," indicating a "pattern that his symptoms changed course from an otherwise fairly benign course to a new painful forever-after type of increased symptoms." (CX-9, p. 26).

Dr. Willetts described the type of injury that could contribute to a pre-existing ankle fracture. Such an injury would include "some new fracture or disruption of the fracture. You'd want to see some dislodgement of the hardware, some comment on the X-ray or the person interpreting the X-ray that some of the hardware had been shifted or loosened in some way." More likely, there should be some evidence of "sufficient ongoing symptoms" which showed Claimant was "going back and asking for repeat follow-up care because things were really different. In the long run that this was some new ongoing change in his situation." He did not find such evidence in the medical records. (CX-9, pp. 22-23).

Likewise, Dr. Willetts described a "severe bang" that would cause a contribution to a knee disorder. Specifically, he described a "change of course" involving a "sufficiently traumatic injury" with follow-up medical treatment of "ongoing visible and palpable swelling or other signs of injury that are credible," as opposed to an injury where Claimant would "just say 'Ow' for the next hour or so." He added that, in "everyday life, everybody bumps knees occasionally ...," which is not assumed to be a contribution to the end result. (CX-9, pp. 27-28).

Dr. Willetts opined Claimant's condition should not become any worse, because his ankle became naturally ankylosed. Prior to that time, there is painful motion associated with moving the joints. At some point they naturally "freeze up," thereby "taking away the painful motion [which] often takes away some of the pain." The process is often attempted medically by performing surgical fusions to achieve the same result. It causes limited motion, or an impairment, which can cause the person to limp or walk "visibly abnormally." (CX-9, pp. 23-25).

Employer's Hospital Records

A microfiched portion of Employer's hospital records indicates Claimant visited the facility on a number of occasions for various maladies from May 28, 1974 until October 24, 2001. (CX-10).

Claimant was returned to regular work on May 28, 1974, pursuant to Dr. Derby's release. (CX-10, p. 1) On June 4, 1976, he was injured when a plank gave way, causing him to twist his ankle. An ace bandage was provided with a cold pack, which was to be used for 20 minutes. (CX-10, p. 2). On June 21, 1978, Claimant sprained his left ankle at home. Both sides of his foot were extremely swollen. His ankle was painful and bruised, and it hurt to walk. An ice water soak was prescribed, and Claimant

was advised to see his own doctor if the pain persisted. He was advised to go home. He was released to return to regular work on July 3, 1978. (CX-10, pp. 3-4). From December 29, 1978 until January 15, 1979, Claimant was absent from work, under the care of Dr. Derby, due to bursitis in his right knee. (CX-10, p. 5).

On August 20, 1980, Claimant reported hurting himself at home. His left ankle was very swollen, with no ecchymosis or redness reported. He stated he wished to work, but was advised to see Dr. Derby. A warm water soak and an ace bandage were prescribed. (CX-10, p. 6).

On August 21, 1981, Claimant's reason for visit was reported as "states involved [sic] in car accident Dec. 29, 1973. Because of ankle arthritis related to accident he is to have a job that does not involve climbing." Claimant "state[d] this is permanent. [He] has had 2 previous operations." It was reported that he was physically unable to climb. On August 24, 1981, a report regarding Claimant's ankle arthritis indicated limited duty was unavailable. During the period from August 21, 1981 until August 25, 1981, Claimant was absent from work under Dr. Derby's care, for ankle arthritis. (CX-10, pp. 7-9).

On July 11, 1983, Claimant twisted his right knee while climbing a ladder. It was reported that bursitis was diagnosed "some years ago." Some tenderness and slight effusion were noted. Moderate strain was diagnosed, and Claimant was prescribed an ice pack, elevation, and an ace bangage. He was restricted from kneeling, crawling, ladder-climbing or tight spots on that date. If no duties were available, Claimant was advised to go home. (CX-10, p. 10).

On February 3, 1984, Claimant reported twisting his left ankle at home the day before. He submitted a note for a "severely sprained" left ankle. He was unable to ambulate or work for a period of 5 days from February 7, 1984. It was reported that Claimant had a prior history of ankle fracture with two pins. A fused ankle joint was noted with minimal edema and tenderness. Claimant "[felt] able to perform work," and was approved to return to work with no restrictions. (CX-10, p. 11).

On April 24, 1984, Claimant sustained a slight sprain when he twisted his ankle while walking. Slight to moderate soft tissue swelling was noted, "some of which [Claimant] states is present since injury" with reduced range of motion (some prior to today). No crepitus was reported. X-rays were negative for new fractures. They indicated old, healed fractures together with an immobilizing nail and screw. The ankle mortise was reported as

"deranged and narrowed." A cold pack to be followed with moist heat was prescribed. Claimant was restricted from ladder climbing. No light duty was available on that date, and Claimant was sent home and paid for his shift. (CX-10, pp. 12-14).

On July 24, 1985, a report indicates Claimant injured his right knee on July 22, 1985, when he slipped, fell backward and twisted his knee. On July 23, 1985, his right knee began feeling unstable while climbing, with sharp pain noted above his knee. (CX-10, p. 15).

Claimant offered two incident reports photocopied from Employer's health facility. (CX-11). On July 18, 1990, Claimant tripped on a train track and twisted his left ankle, which was reported as "very painful." A nurse's examination indicates some swelling, for which an ice pack and Tylenol were prescribed and an X-ray ordered. The X-ray was negative for recent fractures. "Old, healed" fractures were noted "together with an immobilizing nail and screw" The left ankle mortise was narrowed. No interval change was reported since April 24, 1984. Muscle strain was diagnosed, and he was returned home with pay for his shift. (CX-11, p. 1; CX-10, p. 16).

On May 16, 1991, a co-worker stepped on Claimant's left ankle. He reported that he had hardware in his ankle from an automobile accident and that he had "about 20-30 percent movement in it." Tenderness was noted in the ankle, which was reported as "not full weight bearing." Tylenol was prescribed, along with an ice pack, which was to be used for 20 minutes. Contusion and sprain were reported with a left ankle status post fracture secondary to a motor vehicle accident with "pain in place." Claimant was sent home and paid for his shift. (CX-11, p. 3).

On October 24, 2001, Claimant notified Employer's health care facility that he sustained "repetitive trauma to his knees" and legs, which were classified as an occupational illness. The case "initially appeared to involve [no] away days." Throughout his remaining visits until August 13, 2002, Claimant was not reported to have any restricted work or away days. (CX-10, pp. 17-18).

The Contentions of the Parties

Claimant alleges his work with Employer has contributed to and exacerbated or accelerated degenerative effects related to an ankle injury sustained in a motor vehicle accident pre-dating his work with Employer. He also asserts that repetitive crawling,

kneeling, stooping, and climbing on boats caused arthritis in his knees.

Employer avers that the matter should be resolved on the qualifications of the doctors. Drs. Browning and Santoro performed evaluations rather than provided ongoing medical treatment. Thus, neither physician is a treating physician. Dr. Willetts offered an opinion, based upon his review of the notes of Drs. Browning and Santoro, and reached conclusions and opinions consistent with Dr. Santoro, that Claimant's condition is not work-related. Accordingly, Employer contends it is not liable for Claimant's condition.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g, 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968); John W. McGrath Corp. v. Hughes, 289 F.2d 403 (2d Cir. 1961).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm

constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant avers he sustained a compensable ankle injury because he suffers arthritis which was aggravated by his employment with Employer. He argues his bilateral knee arthritis is a compensable injury under the Act because he engaged in crawling, kneeling, climbing, and walking for Employer. Employer contends Claimant's ankle conditions are not compensable under the Act because his ankle condition was the natural progression of a pre-existing non-work-related injury. Employer argues Claimant's knee condition is not a compensable injury under the Act, relying on Gencarelle v. General Dynamics Corp., 892 F.2d 173 (2d Cir. 1989).

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Claimant testified that he sustained arthritis in his left ankle and knees while working for Employer. The last report of any injury Claimant sustained while working for Employer was on May 16, 1991. The latent appearance of his

alleged knee and ankle conditions over ten years later makes it highly unbelievable that they are related to his minor injuries prior to or on May 16, 1991. Claimant sought **no** follow-up medical treatment for his alleged conditions. He testified he has had no medical treatment for his conditions for "at least the last eight or nine years." He merely sought an evaluation for his claims upon the referral of his attorney, and has no plans to return for medical treatment for his alleged conditions. The fact that Claimant sought no medical treatment for such a long period of time and does not intend to seek medical treatment fails to persuade me that his alleged condition is work-related.

My conclusion that Claimant's knee and ankle conditions are not causally related to his work-related accidents is supported by the sound medical reports of Drs. Santoro and Willetts, who found no evidence of any aggravation, acceleration, exacerbation, or combination with another injury resulting in a compensable injury. Both physicians concluded Claimant's condition is the natural progression of aging and a prior injury which was repaired under the less-advanced techniques of the 1970s.

Dr. Browning, who works "half-time" in the area of hands and arms, is the only physician who opined Claimant's condition was work-related. He agreed the results on which he based his conclusions were indistinguishable from the natural progression of aging. He also observed no evidence of trauma, redness, swelling, specific points of tenderness, limping, or abnormal ligaments establishing an injury to Claimant's knees. He based his opinion on the assumption that Claimant's 29 years of work caused his condition. Dr. Willetts specifically indicated that Claimant's job requirements were no different than the requirements of "every day life."

Meanwhile, Claimant candidly admits that he lost little time from work over his career and lost no time from work for the last four or five years. He was capable of performing his job full-time until as recently as the day before the hearing in this matter. He admitted that he was led to file the present claims because he was approaching 50 years old and did not know how much longer he could continue performing his job. Such testimony does little to convince me that Claimant suffers a work-related injury rather than the natural progression of aging.

Thus, Claimant has failed to establish a **prima facie** case that he suffered an "injury" under the Act. Accordingly, he is not entitled to the Section 20(a) presumption that the additional and latent ankle and knee injuries arose out of and in the course of his employment with Employer.

2. Employer's Rebuttal Evidence

Assuming **arguendo** that Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

Under such circumstances, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982); Blanchette v. Director, OWCP, 998 F.2d 109, 112 (2d Cir. 1993)(where an employment injury worsens or combines with a pre-existing impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable); But see Carlson v. Bethlehem Steel Corp., 8 BRBS 486, 489 ("Aggravation" of a claimant's arthritic condition only to the extent that the work-related injury caused temporary recurrence of his symptoms rather than a worsening of his underlying condition is not compensable).

It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Drs. Santoro and Willetts both opined there is no causal relationship between Claimant's ankle and knee conditions, thus severing the potential relationship between Claimant's condition and his work-related injury. Further, Drs. Santoro and Willetts opined Claimant's work events neither directly caused his injuries nor aggravated his pre-existing ankle condition resulting in injury or pain. Consequently, I find that Employer offered substantial evidence to rebut the Section 20(a) presumption. Thus, the causation issue must be based on the record as a whole.

3. Weighing All Record Evidence

Prefatorily, the parties agree, and I find, that none of the physicians of record is Claimant's treating physician. Rather, the physicians examined Claimant or reviewed his file for evaluation only, and Claimant does not expect to return for regular treatment. See Pietrunti v. Director, OWCP, 119 F.3d 1035, 1043 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability unless contradicted by substantial evidence to the contrary); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)(opinions of treating physicians are entitled to considerable weight). Consequently, none of the physicians' opinions is entitled to greater probative value as the opinion of a treating physician.

Claimant argues that the opinions of Drs. Santoro and Willetts should be discounted because their particular definitions of "injury" are not in accord with the definition set forth in the Act. This argument is specious and without merit. The physicians were asked for medical rather than legal opinions. When they discussed injuries, both physicians were addressing the type of objective medical evidence generated through medical treatment which would afford a medical opinion that Claimant's conditions were anything other than a natural progression of his pre-existing conditions which were not work-related. Consequently, Claimant's argument does not diminish the

persuasiveness of the medical opinions of Drs. Santoro and Willetts.

Alternatively, Claimant's position arguably implies Dr. Browning's opinion should be entitled to greater probative value because his particular definition of "injury," which is otherwise silent in the record, is in accord with that set forth in the Act. I find Claimant's argument untenable and unpersuasive for that reason alone.

Rather, I will attribute probative value to the medical opinions based on the physicians' credentials, degree of specialization in the areas of Claimant's conditions, experience, familiarity with Claimant, and soundness of medical reasoning regarding the facts presented. Drs. Santoro and Willetts have excellent credentials and experience. Both physicians offered well-reasoned opinions in their reports and depositions in which they were subject to cross-examination. Accordingly, I conclude that the opinions of Drs. Santoro and Willetts are helpful for a determination of this matter and should not be discounted.

Of Drs. Santoro, Browning, and Willetts, I find the medical opinions of Dr. Santoro most persuasive. He has superior credentials and specializes in orthopedic surgery in the areas of shoulder, knee, and complex foot and ankle problems. His credentials are buttressed by his surgical and educational experience, which is superior to the other physicians of record. His opinions are well-reasoned and supported by the record, as discussed below.

On the other hand, Dr. Browning admitted that he is in "half-time" practice, specializing in hands and arms. He admitted that the areas of specialization among hands, knees, shoulders, foot and ankle injuries have become more differentiated over time. While he is an orthopedic surgeon who evaluates patients primarily for hand and arm disorders, the last surgery he performed occurred in 1986. Dr. Browning currently refers patients who require knee surgery to specialists. Thus, although he has excellent credentials, he is not a specialist who regularly treats patients with knee or complex foot and ankle problems. Accordingly, his lack of experience outside the field of his expertise diminishes the persuasiveness of his opinions.

Meanwhile, Dr. Willetts also possesses excellent credentials, but the persuasiveness of his opinion is somewhat diminished because he failed to evaluate Claimant personally. However, his opinions are well-reasoned regarding the medical records he reviewed and helpful for a rational determination of

the issues presented. Moreover, of the evaluating physicians, Dr. Willetts was provided the benefit of Claimant's additional medical history from Employer's hospital, which tends to buttress the persuasiveness of his opinions.

Dr. Santoro's opinion that Claimant's "incredibly mild form" of arthritic knee condition is caused by the natural aging process rather than his employment with Employer is well-reasoned and supported by the record. His opinion is consistent with the opinion of Dr. Willetts, who agrees that Claimant's knee condition was not accelerated, hastened, or changed by his work for Employer, but was the natural result of normal aging.

Although Dr. Browning disputed Dr. Santoro's conclusion that Claimant's knee condition was the natural result of aging, I find his opinion is not well-reasoned and unpersuasive to establish Claimant's knee condition is work-related. He relied on no evidence of any trauma, redness, swelling, specific points of tenderness, or limping to arrive at his conclusion. Moreover, he had no indication of a specific injury date for Claimant's knees. Additionally, when he previously evaluated Claimant for a hand disorder regarding an unrelated matter, Dr. Browning reported no knee injuries or other symptoms of such injuries.

Rather, Dr. Browning concluded Claimant's knee condition was work-related because Claimant's knees "progressively bothered" him after 29 years of employment which included crawling on his knees on the job. His opinion was based on his experience, but he admitted he would have agreed with Dr. Santoro ten years ago. Having found Dr. Browning is not as experienced in knee injuries as Dr. Santoro, I find his opinion unpersuasive in establishing Claimant's knee condition is work-related.

My conclusion that Claimant's knee condition is not work-related is supported by Dr. Willetts's opinion that kneeling on hard surfaces is an "every day act of life," for which it is inappropriate to try to link a chance observation of some knee abnormalities later in life. His opinion that Dr. Browning has "changed over the last ten years" to become more inclined to attribute injuries to activities of every day life further undermines the persuasiveness of Dr. Browning's conclusion.

Dr. Willetts's description of the type of traumatic injuries which would cause him to change his opinion is persuasive. I find no evidence that Claimant sustained a sufficient force of a bang to cause some visible swelling that persisted and caused him to seek follow-up medical treatment. The only knee injuries of record occurred on July 11, 1983 and July 24, 1985. Neither

injury involved any type of follow-up treatment. Both involved a twist of Claimant's right knee, for which only minor conservative treatment was necessary and provided by Employer. Further, there is no evidence Claimant sustained a traumatic injury of any kind to his left knee. Accordingly, there is no evidence of a sufficient force of a bang to either knee that would support a conclusion that Claimant's knee condition is related to his 1983 and 1985 injuries. Additionally, I find that Claimant's exostosis and bursitis are unrelated to his knee condition and work, as discussed below.

Thus, I find the opinions of Drs. Santoro and Willetts persuasive in establishing Claimant suffers no knee condition that was caused by his employment with Employer. Likewise, the opinions of Drs. Santoro and Willetts are persuasive to establish his knee condition was not aggravated, accelerated, exacerbated, or otherwise combined with a subsequent another injury to form a compensable injury.

In light of the foregoing, I conclude Claimant failed to establish his burden of proof that he suffers a work-related knee condition under Greenwich Collieries, supra. Accordingly, I find that Claimant's degenerative knee arthritis is not the result of a work-related injury, nor is it an aggravation, acceleration, exacerbation, or combination with another injury resulting in a new and compensable injury.

Dr. Santoro's opinion that Claimant's ankle condition is not work-related is well-reasoned and supported by the record. He specifically opined Claimant experienced a natural progression of degenerative change from the 1973 injury that was repaired through less advanced procedures of the 1970s. Likewise, Dr. Browning conceded that he previously diagnosed Claimant with post-traumatic ankle arthritis. He also concluded that there will be some progressive degeneration from a severe fracture, and he would not be surprised if there was some natural progression of arthritis from its earlier state. Dr. Willetts concurred with Dr. Santoro and concluded Claimant's permanent ankle arthritis was the expected sequela of the 1973 ankle fracture repaired with the techniques used in the 1970s.

Likewise, Claimant understood from Dr. Derby that he should expect his ankle to become worse and develop arthritis as a result of his 1973 injury. Employer's hospital records indicate Claimant reported permanent ankle arthritis related to his 1973 car accident as early as August 21, 1981, at which time he missed several days due to ankle arthritis. Accordingly, based on the record as a whole, I conclude Claimant's ankle arthritis is the

expected result of his 1973 car accident rather than his employment activity with Employer.

Moreover, the opinions of Drs. Santoro and Willetts are persuasive to establish that Claimant's minor ankle injuries sustained since his original 1973 injury did not aggravate, exacerbate, or accelerate Claimant's condition which resulted from the 1973 accident. According to Dr. Santoro, tripping is not exclusive to injured persons, but a diminished "ability to negotiate" which can be expected with a stiff ankle. Thus, Dr. Santoro expected Claimant to suffer minor ankle injuries resulting in temporary exacerbations of pain, but could not find evidence of more significant injuries that would require medical treatment which could form the basis of a conclusion that Claimant aggravated, accelerated, or exacerbated his condition at work.

Similarly, Dr. Willetts, who was afforded the benefit of additional medical history of Claimant's ankle injuries, opined such minor injuries did not aggravate Claimant's condition. He concluded that evidence of more significant injuries was necessary to warrant a conclusion that Claimant aggravated or accelerated his condition at work. His opinion is well-reasoned and persuasive. The record supports his conclusion that Claimant's ankle was already significantly compromised and would be expected to deteriorate regardless of any twist or minor injury.

Meanwhile, Dr. Browning acknowledged there are different causes of arthritis, including activity, injury, and aging. He conceded that his opinion was based on X-ray evidence reflecting radiological conditions that cannot be distinguished from the natural and unavoidable progression of the original injury. Thus, he based his conclusion on his own experience. Having previously found that Dr. Browning is less experienced than Dr. Santoro in the areas of knee and complex foot and ankle injuries, I find that his opinion based solely on his experience and X-ray evidence, which is indistinguishable from a natural and unavoidable progression of an original injury, is less persuasive. Accordingly, I find Claimant's ankle condition was not aggravated, accelerated, exacerbated or otherwise combined with a subsequent injury to form a new injury.

My conclusion that Claimant's ankle condition is not work-related is buttressed by Employer's hospital records, which indicate Claimant sustained injuries roughly the same number of times at home as his did at work since 1973. Notably, Claimant's injuries at home resulted in significantly longer periods of

absenteeism from work than his work-related ankle injuries did. Such results are consistent with Dr. Santoro's conclusions that an inability to negotiate is to be expected with Claimant's condition but is not exclusive to work activity.

As Drs. Santoro and Willetts observed, Claimant never followed-up or sought outside treatment for ongoing symptoms associated with his ankle injuries. Claimant admitted he has not consulted anybody for his knees or ankle for at least eight or nine years. Although Claimant may have obtained Dr. Derby's restrictions from returning to work in 1984, 1981, and 1978, there is no indication Dr. Derby treated Claimant's ankle for anything other than ankle arthritis from his 1973 automobile accident. As Dr. Willetts reported, X-rays from 1984 and 1990 indicate that no change in Claimant's condition was observed during that period of time.

In light of the foregoing, I conclude Claimant failed to carry his burden of proof and persuasion under Greenwich Collieries, supra, to establish he suffers a work-related ankle condition or that he suffers a disability under the Act. Accordingly, I find that Claimant's degenerative ankle arthritis is not the result of a work-related injury, nor is it an aggravation, acceleration, exacerbation, or combination with another injury resulting in a new and compensable injury. Moreover, I find that the record does not support a conclusion that Claimant's bursitis and exostosis were related to his work or his ankle arthritis, as discussed below.

Claimant identified a diagnosis of bursitis in 1978, but failed to allege such a diagnosis was causally related to his work or to his knee or ankle conditions. Assuming **arguendo** that Claimant would suggest his bursitis is work-related, I find that the record does not support a conclusion that the 1978 diagnosis of bursitis is related to Claimant's work or to his ankle or knee conditions. None of the physicians discussed it in any significant detail or offered any opinion on whether it was work-related or whether it may have contributed to Claimant's present knee and ankle conditions. Claimant never offered testimony that his bursitis was work-related or related to his knee and ankle conditions.

Likewise, Claimant's exostosis, which was first noted when he was eight years old, has not been a problem according to Dr. Browning. Claimant did not allege, nor do I find, that such a condition was work-related or related to his present knee or ankle conditions for the same reasons I find his bursitis was not related to his work or his ankle or knee conditions.

Lastly, Employer argued at the hearing and in its post-hearing brief that the facts of this matter are analogous to those in Gencarelle, supra. Claimant failed to address Employer's argument.

In Gencarelle, a claimant who worked for Employer was employed in a job that involved bending, squatting and climbing. He sustained injuries to his knee, which he banged and twisted. He developed chronic synovitis, an arthritic condition of the knee. He underwent surgery for the condition and filed a claim for benefits based upon an alleged repetitive trauma. The administrative law judge found the condition was caused from a combination of the previous traumatic injuries rather than repetitive trauma. The Board denied claimant's argument that his arthritic condition was an occupational disease; however, the Board noted that an injury may occur over a gradual period of employment and still be construed as accidental. See also Pittman v. Jeffboat, Inc., 18 BRBS 212, 214 (1986) (an injury includes one occurring gradually as a result of continuing exposure to conditions of employment); Steed v. Container Stevedoring Co., 25 BRBS 210, 215 (1991) (the gradual work-related aggravation of claimant's lumbar stenosis was an accidental injury rather than an occupational disease because walking and standing were not peculiar to claimant's employment and there was no evidence that others in similar employment develop the condition).

In Gencarelle, the Second Circuit affirmed the determination that claimant's synovitis was an accidental injury rather than an occupational disease. The Court noted, "It is ... necessary not to extend [the Act] so as to make it a general health insurance, and to avoid this the coverage for occupational disease must be limited to diseases resulting from working conditions peculiar to the calling." According to the Court, "the relevant comparison is between the hazardous conditions at the claimant's workplace and the corresponding conditions - or background risks - of employment generally." The Court found that the claimant's condition was not peculiar to his employment:

Many occupations - blue and white collar alike - require repeated bending, stooping, squatting, or climbing. Even necessary non-occupational activities, such as cleaning a bathroom or sweeping a floor, require repeated stress on the knees as well as other joints in the body. Gencarelle's activities were common to many occupations indeed to life in general.

Likewise, I find that Claimant's conditions are not occupational diseases because the conditions are not peculiar to his employment. Many occupations require repeated climbing, crawling, and kneeling. As Dr. Willetts opined, kneeling on hard surfaces is an "every day act of life." Although Dr. Browning attempted to draw an analogy to occupations involving laying tile, I find that the record evidence is insufficient to establish that others in similar employment to Claimant's develop the same conditions. Specifically, there is no evidence in the record of the requirements of occupations involving laying tile to support a conclusion that such occupations are similar to Claimant's, nor is there any objective evidence in the record that such occupations cause Claimant's conditions. Thus, under the facts presented, I find Claimant's conditions are not occupational diseases.

Moreover, in Gencarelle, the Second Circuit affirmed the determination that the claimant's condition did not result from repetitive trauma based on his failure to report or seek treatment for his knees and the lack of forthright medical opinion showing the necessary causal link. 892 F.2d at 178. As noted above, Claimant failed to seek medical treatment for any conditions in his ankle or knees for at least the last eight or nine years. Likewise, he has no plans to seek medical treatment for his alleged conditions. He has been able to continue working full-time, missing no work for the last five years. The consistent medical opinions of Drs. Santoro and Willetts render Dr. Browning's medical opinion unpersuasive in establishing a causal link between Claimant's employment and his conditions. Accordingly, based on Claimant's failure to seek treatment for his ankle or knees and the lack of forthright medical opinion establishing the necessary causal link, I conclude Claimant's condition is the natural progression of aging and his prior non-work-related condition.

B. Nature and Extent of Disability

A finding that Claimant suffered no work-related injury pretermits further discussion regarding nature and extent and maximum medical improvement. However, assuming **arguendo** that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The

permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

Regarding Claimant's impairment due to his knee condition, Dr. Browning identified no specific knee injury and understood that Claimant missed no specific time from work because of his knees and that he was able to work full-time without restrictions. Nevertheless, Dr. Browning relied on the AMA Guides to arrive at his conclusion that Claimant should be assigned a 7.5 percent permanent impairment. Dr. Browning's explanation for his impairment rating is not well-reasoned. As Dr. Willetts asserted, the AMA Guides offer two methods to assign an impairment rating. The first method sets forth a rating based on objective measurements taken from X-rays performed under certain conditions. This method is inapplicable because Dr.

Browning took no measurements. The other method of assigning an impairment rating involves a more subjective approach when there is a history of direct trauma, complaints of patellofemoral pain and crepitation, but without joint space narrowing on X-rays. Under that approach, a 5 percent lower extremity impairment rating is given.

The opinions of Drs. Santoro and Willetts are persuasive in establishing that Claimant's documented medical history does not support a finding that he suffered any traumatic injury to his knees to justify assigning a permanent impairment; however, assuming **arguendo** Claimant could establish a permanent impairment, I find Claimant would suffer no more than a 5 percent impairment, pursuant to Dr. Willett's opinion, especially as Claimant never lost any work over the last five years nor sought any medical treatment for his alleged condition for at least the last eight or nine years.

Nevertheless, I find the record does not support a conclusion that Claimant suffers any measure of disability under the Act. Claimant failed to introduce any evidence of any economic loss due to his knee condition. Claimant admitted he lost no work in the past four or five years due to injuries while performing his job as inspector, which he performed without restrictions until as recently as the day before the hearing. Employer's hospital records support Claimant's position that he continues to work full-time without "away days" despite his claims for compensation benefits. Claimant admitted he filed no claim for compensation benefits until the present claim, which he filed because of his age and his doubts that he can perform his job much longer. Accordingly, I find that Claimant failed to establish a **prima facie** case of total disability and that he suffers no disability under the Act due to his knee condition.

Regarding any permanent impairment due to Claimant's ankle injury, I find the record supports a conclusion that Claimant suffers a 24 percent impairment from his ankle condition; however, that condition is due to his 1973 non-work-related injury, as explained above. Moreover, for the same reasons discussed above, Claimant failed to introduce any evidence of any economic loss due to his ankle condition. Thus, I find that the record does not support a conclusion that Claimant suffers any measure of work-related disability under the Act due to his ankle condition.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., *supra*; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

None of the physicians of record offered any opinion regarding maximum medical improvement concerning either of Claimant's conditions. The record establishes that Claimant's ankle condition after his non-work-related injury became stable when he was released by his physician to return to regular work without restrictions on May 28, 1974. Thereafter, Claimant's ankle condition temporarily worsened due to his work-related and non-work-related injuries; however, his condition became stable after each injury upon his return to work without restrictions. Likewise, the record indicates his knee condition, which was never treated for any ongoing condition, became stable when he returned to work without restrictions after his last documented knee injury in 1985. Thus, Claimant's ankle condition has remained stable since 1974 and his knee condition stabilized in 1985.

VII. ATTORNEY'S FEES

For a fee to be awarded pursuant to Section 28(a), the claimant's attorney must engage in a "successful prosecution" of the claim. 33 U.S.C. § 928(a); 20 C.F.R. § 702.134(a); Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982); Petro-Weld, Inc. v. Luke, 619 F.2d 418 (5th Cir. 1980); American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); Rogers v. Ingalls Shipbuilding, Inc., 28 BRBS 89 (1993); Harms v. Stevedoring Servs. of America, 25 BRBS 375 (1992); Kinnes v. General Dynamics Corp., 25 BRBS 311 (1992). No award of attorney's fees for services to the Claimant is made herein because Claimant's attorney did not engage in a successful prosecution of this claim. See Karacostas v. Port Stevedoring

Co., 1 BRBS 128 (1974)(judge denied claim for compensation);
Director, OWCP v. Hemingway Transp., Inc., 1 BRBS 73 (1974).

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier is not liable for Claimant's knee or ankle conditions, which are not work-related.
2. Claimant's claims are hereby **DENIED** in their entirety.

ORDERED this 20th day of February, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge